Vincent Industrial Plastics, Inc. and International Chemical Workers Union Local 1032 a/w International Chemical Workers Union, AFL-CIO. Cases 25-CA-23311, 25-CA-23647, 25-CA-23753, 25-CA-23864, 25-CA-23869, 25-CA-23878, and 25-CA-23892

October 1, 2001

## SUPPLEMENTAL DECISION AND ORDER BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 30, 1999, the National Labor Relations Board issued its Decision and Order in this proceeding. Substantively, the Board found that the Respondent violated Section 8(a)(1) by interrogating an employee about union activities; Section 8(a)(3) by issuing written warnings to and discharging employees because of their union activities; and Section 8(a)(5) by making several unilateral changes in terms and conditions of employment during contract negotiations, and by withdrawing recognition and by refusing to recognize and bargain with the Union. The Board ordered, inter alia, that Respondent bargain on request with the Union.

Subsequently, the Respondent filed a petition for review and the Board cross-petitioned for enforcement. On April 14, 2000, the United States Court of Appeals for the District of Columbia enforced the Board's remedial order, except for the affirmative bargaining order. The court denied its enforcement and remanded the case to the Board to justify on the facts in this case the imposition of an affirmative bargaining order "by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Having accepted the court's remand, we regard its opinion concerning the affirmative bargaining order to be the law of the case. We have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants a reaffirmation of our original finding that an affirmative bargaining order is the appropriate remedy for the Respondent's refusal to recognize and bargain with the Union.

1. An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Employer's unlawful withdrawal of recognition. In contrast,

an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, as the Board found in its initial decision, Vincent Industrial Plastics, supra, the Respondent's numerous and serious unfair labor practices were of the type that would cause employee disaffection from the union. Indeed, during the course of the parties' negotiations for an initial collective-bargaining agreement, the Respondent committed the first in a series of unfair labor practices that undermined the employees' support for the Union. The Respondent first violated Section 8(a)(5) by unilaterally changing the employee attendance policy in July 1994, only 6 months after the parties began contract negotiations, and less than a year after the Union's certification as the unit employees' collective-bargaining representative. The Board has long recognized that a newly certified union needs a year to establish itself in the eyes of the employees it represents. See, e.g., Centr-O-Cast & Engineering Co., 100 NLRB 1507, 1508 (1952). The Board has also recognized that bargaining for an initial contract is especially difficult. See Lee Lumber & Bldg. Material Corp., 334 NLRB 399, 404 (2001).

The Respondent's unilateral change to the employee attendance policy was soon followed by more unilateral changes to employees' terms and conditions of employment, i.e., altering quality control employees' job duties and adding more time to their shifts, and changing the employees' timekeeping procedure. These changes were made without any notice or opportunity to bargain with the Union. Thus, in complete disregard for its collective-bargaining obligation, the Respondent compounded the acknowledged difficulty in negotiating an initial collective-bargaining agreement, and deprived the employees of the use of their chosen bargaining representative free of unlawful interference by the Respondent.

In addition to the unlawful unilateral changes, the Respondent violated Section 8(a)(3) both by disciplining a member of the Union's negotiating team, who was also a former union steward and, more significantly, by discharging the union president. It is hardly surprising that, on the same day as the union president was discharged, this series of unfair labor practices culminated with the employees circulating a decertification petition and obtaining, by the next day, 82 of 128 unit employees' Because signatures. the only demonstrated dissatisfaction with the Union appears to have been unlawfully fomented by the Respondent's own actions, a temporary decertification bar would trench very little on

<sup>&</sup>lt;sup>1</sup> 328 NLRB 300.

<sup>&</sup>lt;sup>2</sup> 209 F.3d 727.

<sup>&</sup>lt;sup>3</sup> Id. at 738.

decertification bar would trench very little on genuine employee desire (if there is any) to remove the Union as the bargaining representative. At the same time it would protect the countervailing desire to be represented by the Union initially expressed by a majority of the employees, as reflected in the earlier certification, by giving the Union a reasonable time in which to reestablish the bargaining relationship and its status with the employees, and get on with contract negotiations.

The Respondent did not cease its unlawful conduct with the withdrawal of recognition. To the contrary, it continued to make unilateral changes to the unit employees' terms and conditions of employment, including increasing wages and implementing a 401(k) plan. Further, the Respondent unlawfully disciplined and discharged another union official. By this conduct, the Respondent demonstrated to employees that support for the Union would be punished, while rejection of the Union would be rewarded, and thereby further derogated the Union's status and interfered with the collectivebargaining process. It is clear that only an affirmative bargaining order will provide the necessary opportunity for the Union to prove itself to the unit employees and, likewise, for the unit employees to assess for themselves the merits of collective-bargaining representation by the Union.

Further, as found by the judge, the February 16, 1995 decertification petition did not reflect employee free choice under Section 7, but rather the effect of the Respondent's most serious prewithdrawal unfair labor practices described above. We find that these additional circumstances support giving greater weight to the Section 7 rights that were infringed by the Respondent's unlawful withdrawal of recognition.

2. The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining or to engage in any other conduct designed to further discourage support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor prac-

tice charges and issuance of a cease-and-desist order. Thus, the affirmative bargaining order, and the temporary decertification bar that it would provide, would restore to the Union and the majority who selected the Union a benefit that the Respondent's violations deprived them of, namely a period of repose during which the bargaining relationship will have a genuine opportunity to bear fruit.

3. A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where many of the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employees' disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of any employees who oppose continued union representation for reasons that do not result from the Respondent's unlawful undermining of the bargaining processor disparagement of the Union's status.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case. Accordingly, we shall reaffirm the Board's prior order that the Respondent recognize and, on request, bargain in good faith with the Union.

## ORDER

The National Labor Relations Board reaffirms its original order, reported at 328 NLRB 300 (1999), and orders that the Respondent, Vincent Industrial Plastics, Inc., Henderson, Kentucky, its officers, agents, successors, and assigns shall take the actions set forth in that Order.